

**Attorneys General of New York, California, Illinois,
Maryland, Minnesota, and Washington**

Via Federal eRulemaking Portal

May 12, 2023

The Honorable Michael S. Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Carolyn Schroeder
Pesticide Re-evaluation Division
Office of Pesticide Programs
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments regarding Notice of Proposed Rulemaking *Pesticides; Agricultural Worker Protection Standard; Reconsideration of the Application Exclusion Zone Amendments*, 88 Fed. Reg. 15346 (Mar. 13, 2023), docket identification number EPA-HQ-OPP-2022-0133

Dear Administrator Regan and Ms. Schroeder:

The undersigned Attorneys General (the “States”) submit these comments on EPA’s proposed rule to revise and reinstate certain application exclusion zone requirements of the Worker Protection Standard that were originally promulgated in 2015. We support EPA’s proposed rule, which would protect against unreasonable adverse effects from exposure to pesticides among agricultural workers, pesticide handlers, and other persons who may be near ongoing pesticide applications on agricultural establishments.

I. Background

The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y, requires EPA to take steps to protect humans and the environment from unreasonable adverse effects of pesticides. Consistent with this obligation, EPA promulgated regulations intended to reduce the risk of illness and injury to individuals exposed to pesticides while working on farms or in forests, nurseries, and greenhouses. *See* 40 C.F.R. Part 170 (the “Worker Protection Standard”). The Worker Protection Standard is “primarily intended to reduce the risks of illness or injury to

workers¹ and handlers² resulting from occupational exposures to pesticides used in the production of agricultural plants on agricultural establishments.” 40 C.F.R. § 170.301.

The 2015 Rule

In 2015, EPA updated and strengthened the Worker Protection Standard to better protect farmworkers, pesticide handlers, vulnerable groups, and other persons against unreasonable adverse effects from exposure to pesticides. *Final Rule, Pesticides; Agricultural Worker Protection Standard Revisions*, 80 Fed. Reg. 67,496 (Nov. 2, 2015) (the “2015 Rule”). The 2015 Rule established interrelated measures to reduce the exposure of workers, handlers, and bystanders to pesticide applications, and to reduce acute and chronic health impacts associated with these exposures.

The 2015 Rule included the creation of an Application Exclusion Zone, referring to the area around pesticide application equipment that must be free of all persons other than appropriately trained and equipped handlers during pesticide applications. 80 Fed. Reg. at 67,496-97, 67,521–25, 67,564. Specifically, the Application Exclusion Zone is a circle surrounding the location of the application equipment that moves as the application equipment moves, the radius of which varies from 25 to 100 feet depending on the method of application. *Id.* at 67,523, 67,564; *see also* 40 C.F.R. § 170.405(a)(1). The 2015 Rule established several requirements, including (1) a “keep out” requirement, which mandated that employers not allow any workers or other persons inside the Application Exclusion Zone within the boundaries of the establishment until the application is complete, *see* 40 C.F.R. § 170.405(a)(2), and (2) a suspension requirement, providing that handlers performing a pesticide application immediately suspend the application if any workers or other persons (excluding trained and equipped handlers) are present within the Application Exclusion Zone, including where that zone extends beyond the boundaries of the establishment, *see* 40 C.F.R. § 170.505(b).

When creating these requirements, EPA acknowledged that the pre-2015 Worker Protection Standard already included a “do not contact” requirement—that is, a requirement that “employers and handlers . . . assure that no pesticide is applied so as to contact, either directly or through drift, any worker or other person, other than an appropriately trained and equipped handler.” 80 Fed. Reg. at 67,523. EPA determined that the creation of an Application Exclusion Zone, and the requirement to suspend application when workers or other persons come within the Application Exclusion Zone during pesticide application, were critical *additional* steps necessary to protect human health: “EPA has identified a need to supplement the ‘do not contact’ performance standard because exposure to drift or direct spray events still happen despite the ‘do not contact’ requirement.” *Id.* at 67,524.

¹ The Worker Protection Standard defines a “worker” as “any person, including a self-employed person, who is employed and performs activities directly relating to the production of agricultural plants on an agricultural establishment.” 40 C.F.R. § 170.305.

² A “handler” is any person “who is employed by an agricultural employer or commercial pesticide handler employer” and who performs activities such as “mixing, loading, or applying pesticides,” “disposing of pesticides,” “handling opened containers of pesticides,” or “assisting with the application of pesticides.” 40 C.F.R. § 170.305.

EPA further concluded that requiring applicators to suspend activities even when the Application Exclusion Zone extends beyond the boundaries of the agricultural establishment was warranted for several reasons, including that it was necessary to protect against harmful worker and bystander exposure, and because the existing “do not contact” requirement likewise extended beyond the boundaries of the establishment. *See id.*

The 2020 Rule

On November 1, 2019, EPA published in the Federal Register a Notice of Proposed Rulemaking proposing several changes to the Application Exclusion Zone provisions. *Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements*, 84 Fed. Reg. 58,666 (Nov. 1, 2019). EPA proposed to lessen the protections that the 2015 Rule established by revising the Application Exclusion Zone in two critical ways: First, EPA proposed to revise both the “keep out” and the “suspend application” requirements to allow pesticide applications to occur or resume while persons not employed by the establishment are present on easements within the boundaries of the agricultural establishment. *See id.* at 58,670, 58,674. Second, EPA proposed to revise the “suspend application” requirement to limit the Application Exclusion Zone to the boundaries of the establishment. *See id.* at 58,670, 58,674. In January 2020, the Attorneys General of New York, California, Illinois, Maryland, Minnesota, New Jersey, and Washington submitted comments in opposition to the proposed rule, a copy of which is attached (the “2020 Multistate Comments”).

EPA published the 2020 Rule on October 30, 2020. *See* 85 Fed. Reg. at 68,760. The 2020 Rule largely adopted the changes to the Application Exclusion Zone as proposed and was set to go into effect on December 29, 2020. On December 16, 2020, New York and several other states and several public health organizations filed civil actions in the United States District Court of the Southern District of New York challenging the rule (now consolidated as case number 1:20-cv-10642). On December 28, the Court issued an order staying the 2020 Rule’s effective date. Following that order, the Court issued several additional orders extending the preliminary injunction and staying all proceedings and accordingly, the 2020 Rule has never gone into effect.

While EPA was preparing the administrative record in response to the civil actions filed in the Southern District of New York, EPA discovered a factual error in the “preamble of the 2020 [Application Exclusion Zone] Rule regarding the scope of the [Application Exclusion Zone] content within EPA-approved trainings.” 88 Fed. Reg. at 15,350. The preamble had inaccurately stated that all “EPA-approved trainings since 2018” had incorporated EPA’s 2016 guidance on best pesticide application practices to prevent contract through drift. *Id.* However, some of the approved trainings “only contained a partial set of the topics provided in guidance” and EPA’s “reliance on this inaccurate assumption” provided an additional reason to reinstate the 2015 Worker Protection Standard requirements. *Id.*

The Proposed Rule

In the current proposal, EPA seeks to reinstate “the protections as originally established in the 2015 [Worker Protection Standard]” and the “proposed revisions aim to reestablish the

level of protections afforded to all who are on an agricultural establishment and may be within the vicinity of an ongoing application, with slight modifications to support compliance and understanding.” 88 Fed. Reg. at 15,351.

II. The States’ Interest in Effective Protections Against Pesticide Exposure

As set forth more fully in the 2020 Multistate Comments and incorporated here by reference, *see* Exhibit A at pp. 3-5, the States have a critical interest in ensuring that agricultural workers and others on or near agricultural establishments are protected from the adverse effects of exposure to harmful pesticides. The agricultural sector ranks among the most hazardous industries in the country. *See* Centers for Disease Control & Prevention, National Institute for Occupational Safety & Health (“NIOSH”), *Agricultural Safety*.³ Farmworkers experience particularly high rates of fatal and nonfatal injuries and illnesses. *See id.*; *see also* Ramya Chari, Amii M. Kress, & Jaime Madrigano, RAND Corporation, *Injury & Illness Surveillance of U.S. Agricultural Workers*, at ix (2017).⁴

As EPA has previously acknowledged, “illness resulting from pesticide exposure to workers and handlers is underreported,” with studies indicating that underreporting ranges from 20 to 70 percent for occupational illnesses and for poisoning incidents. *See* U.S. Environmental Protection Agency, Office of Pesticide Programs, *Economic Analysis of the Agricultural Worker Protection Standard Revisions*, at 123, 132 (Nov. 12, 2015).⁵ Moreover, many pesticide exposures do not result in acute symptoms but, when accumulated over time, can result in chronic symptoms that may appear many years after exposure. *Id.* at 132.

III. Comments on the Proposed Rule

As noted at the outset, the States support EPA’s proposed rule, which would formally reinstate several provisions from the 2015 Worker Protection Standard that are protective of public health. We offer specific comments on the following: (a) reinstatement of the “suspend application” requirement without limiting its effect to the boundaries of an agricultural establishment; (b) removal of language that would have made the Application Exclusion Zone inapplicable in easements that are located within the boundaries of the agricultural establishment; and (c) reinstatement of the 2015 Rule’s distance requirements for certain ground-based sprays.

a. Reinstatement of the “Suspend Application” Requirement in the Application Exclusion Zone

EPA proposes to reinstate the Application Exclusion Zone provision that requires handlers performing a pesticide application to immediately suspend the application if any workers or other persons (excluding trained and equipped handlers) are present within the Application Exclusion Zone by “removing clauses limiting its effect to persons only within the boundaries of the agricultural establishment.” 88 Fed. Reg. at 15,351. The States support this

³ Available at <https://www.cdc.gov/niosh/topics/aginjury/default.html> (last visited Dec. 16, 2020)

⁴ Available at https://www.rand.org/pubs/research_reports/RR1500.html

⁵ Available at <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OPP-2011-0184-2522&contentType=pdf>.

reinstatement because requiring applicators to suspend activities even when the Application Exclusion Zone extends beyond the boundaries of the agricultural establishment helps protect against worker and bystander exposure to harmful pesticides. *See* Multistate Comments at 2-3.

b. Removal of Language that Would Have Made Application Exclusion Zone Inapplicable in Easements

EPA proposes to remove language from the 2020 Rule that would have made the 2015 Rule’s Application Exclusion Zone requirements “inapplicable in easements within the agricultural establishment.” 88 Fed. Reg. at 15,352. The States support this revision because it aligns with the States’ interest in ensuring that agricultural workers and others on or near agricultural establishments, such as utility workers in easements within the agricultural establishment, are protected from the adverse effects of exposure to harmful pesticides.

The 2020 Rule would have allowed pesticide applications to occur or continue while persons not employed by the establishment (for example, utility workers) are present on easements within the boundaries of the agricultural establishment. This approach would have allowed handlers to continue applying harmful pesticides in close proximity to utility workers and others who are on the agricultural employer’s property, so long as those workers are on an easement within the property. By removing language making the Application Exclusion Zone requirements inapplicable in easements and restoring the 2015 Rule’s approach, EPA would increase protections for both workers and bystanders. *See* Multistate Comments at 2-3.

c. Reinstatement of 2015 Rule’s Distance Requirements

As set forth above, the 2015 Rule created an Application Exclusion Zone, the radius of which varied from 25 to 100 feet depending on the method of application and the spray quality (droplet size). The 2020 Rule revised the 2015 Rule by establishing one 25-foot radius for all ground-based applications, regardless of droplet size.

EPA proposes to reinstate the 2015 Rule’s provisions setting different application exclusion distances based on droplet size. 88 Fed. Reg. at 15,354. The States support this reinstatement because it is more protective of human health and reduces the risk of adverse effects of exposure from pesticides. *See* Multistate Comments at 2-3.

IV. Conclusion

The agency’s proposed rule is consistent with its obligations to protect human health and the environment. The States accordingly urge EPA to finalize the proposed rule.

Sincerely,

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